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War Powers in the Obama Administration

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With the arrival of a new American president in 2009, the power and constitutional authority of the commander in chief to engage in military action remains as relevant as ever. Barack Obama inherited a war in Iraq, has worked with the North Atlantic Treaty Organization to initiate a 17,000 American combat troop surge in Afghanistan in March 2009 and another increase of 30,000 personnel later that year, more than doubling the total American presence. He also permitted American Navy Seals to use force against Somali pirates in the first months of his presidency. In addition, nuclear development and proliferation concerns in Iran and North Korea remain ongoing diplomatic challenges for this administration, as well as the expanding civil conflict in Pakistan. Moreover, if pressures increase for American military intervention in Sudan's humanitarian crisis or if the drug wars in Mexico continue to expand, the United States will face even more questions over how and when to engage American military forces abroad.

At the same time, the new commander in chief inherits a presidency from George W. Bush that has been viewed as 'imperial' by many constitutional experts. This legacy, which was evident well before the administration left office, was likely instrumental in generating new bipartisan interest in seeking a more balanced war powers relationship between the commander in chief and the Congress. Most significantly, the recommendations of the Baker-Christopher Commission in 2008 called upon Congress to assert its constitutional war powers through a revision of the War Powers Resolution, which has been viewed as a failure on many fronts.¹ The commission's recommendations have already been soundly criticized by a range of experts, yet resulted in a number of congressional hearings in 2009, which suggests some degree of public interest in reassessing the constitutional balance between the commander in chief and Congress over the use of force abroad.²

This article seeks to explain the war powers political context of the Obama presidency. The focus here is on when a president may use military force abroad, rather than the broader range of powers that presidents may assert during wartime. Given that most research agrees that the commander in chief has played the determining role in shaping how and when force is used abroad, the study begins with a short overview of the war powers historical environment that the Obama administration inherits, with a brief assessment of the legacy of the George W. Bush administration.

The paper then follows with an examination of President Barack Obama's and Vice President Joseph Biden's previous views on war powers. In the context of the modern presidency, and certainly since the Cold War's end, Obama and Biden as president and vice-president are unique as leaders of the executive branch, in that their previous national political experience existed almost exclusively in the United States

Senate, where multiple opportunities existed to express their views on constitutional war powers. An understanding of their previous political background and positions on war powers may be useful in shaping and explaining how they perceive the appropriate balance of power now at the White House. Given that Congressman Richard Cheney's views on war powers comported closely with his positions as Secretary of Defense and Vice President of the United States, the approach used in this research may give insight on what may be expected in this new administration. The article also provides a brief assessment of Secretary of State Hillary Clinton's view on war powers when she served in the US Senate. These analyses are followed with examinations of the Obama administration's military actions in Afghanistan and the Department of Defense's use of force against Somali pirates.

Although it is early in the Obama administration, these first military actions indicate that despite Obama's and Biden's records in the Senate of supporting meaningful congressional checks on the commander in chief, that old patterns are difficult to break; the commander in chief is leading, with limited engagement from Congress. Obama's and Biden's past actions in the Senate do not appear to be good indicators of their current practices in the White House. Their previous views on congressional war powers are not, at least from these first military decisions, the guiding constitutional principles that shape their relationship with the Congress. Much as for previous presidents, assertiveness as commander in chief is an institutional pattern in the conduct of the executive branch.

Moreover, Congress generally continues to defer to the commander in chief, and partisan politics do not capture this element of executive legislative relations. In the era following the Second World War, American presidents have increasingly asserted wide military powers, as Congress has ceded much of its war powers authority to the president, which the American public seems to often accept and is evident again in the Obama presidency. These patterns comport with most literature on presidential war powers, and also indicate that similar to the Bush presidency, the centre of decision-making for American military policy is the White House and not the American Congress.

Constitutional War Powers and George W. Bush as Commander in Chief

Much of the recent scholarship on the administration of congressional war powers during the presidency of George W. Bush suggests that this era differed substantially from the principles created by America's constitutional framers on the decision to use force abroad. The Constitution provides the president the power to act as the country's commander in chief, but this power was balanced by a long list of congressional powers that speak directly to the use of force abroad. These powers include the powers to declare war, to provide for the common defence, to grant letters of marque and reprisals, to provide and maintain a navy, to suppress insurrections and repel invasions, and to raise and support armies.³ When discussing these powers, especially the power to declare war, James Madison's notes on the constitutional convention make it clear that the constitutional framers believed that the president may use force unilaterally only to 'repel sudden attacks'. Otherwise the use of force required congressional approval.⁴

The history of the constitutional ratification debates is similarly clear. Analysts have identified many instances when the framers and their supporters confirmed the understanding reached at the constitutional convention: war could not be entered into solely through a decision from the executive branch—legislative approval was required. The commander in chief was not permitted to act in the same manner as the British monarch, who could take his country to war at will.⁵

For much of the 19th century and through nearly half of the 20th century, presidents tended to respect this basic understanding of checks and balances. In the years before the Second World War, Congress was considered by many presidents as the ultimate ‘decider’ in determining if and when force would be used. In the majority of instances, presidents respected Congress’s war powers and actively sought legislative approval prior to the use of military force.⁶

With the onset of the Cold War, many analysts agree that Congress began the practice of deferring to presidential military ambitions by granting the commander in chief considerable leeway to defend the United States against perceived communist threats. At the same time, presidents began to make more expansive unilateral assertions of their war powers, such that Congress’s war powers became much less meaningful in restraining American commanders in chief.⁷ Even in the context of the Clinton presidency, in which a chief executive faced an ostensibly assertive Republican Congress for the last six years of his presidency, and in an environment in which the president did not have good political standing with the American military, Bill Clinton was still able to make unilateral assertions of power as commander in chief, which Congress largely accepted.⁸

Within this recent historical context, during the administration of George W. Bush the executive branch similarly made bold assertions of its alleged power to use force abroad. Although Congress specifically granted Bush broad military discretion for its global war on terrorism and later for the war in Iraq, many elements of the executive congressional interplay are illustrative of a commander in chief who sought few restrictions on his perceived authority to use force abroad.⁹ For example, in the lead-up to the war in Iraq, the Bush administration initially maintained that while they would consult Congress before a war, they did not need congressional approval to use force against Saddam Hussein.¹⁰ Upon considerable pressure from Congress, a vote to use force eventually occurred. Yet Congress’s checking and oversight role here was quite limited, and through its own legislative efforts, ceded the actual decision on whether or not to use force to the president at his own determination.¹¹ Bush also made extensive claims as commander in chief in the American deployment of troops to Haiti in late February 2004 as part of a UN peacekeeping operation. Few members of Congress questioned the president on the decision to deploy these troops, and no legislative effort was made to challenge Bush’s asserted authority to send American troops abroad into a civil conflict where conditions were far from stable.¹²

One final example of Congress’s willingness to defer to presidential wishes was evident when the Democrats gained majority status in the House of Representatives and the Senate after the 2006 mid-term elections. After campaigning nationally for an end to the American military presence in Iraq, and highlighting the faulty claims advanced by the Bush administration to justify the war, the Democratic-led Congress

then funded Bush's 20,000-person troop surge in Iraq, which in many respects, directly contrasted with the Democrats' electoral promises. Certainly, the congressional Democrats expressed their concerns with Bush's 2007 troop surge.¹³ Yet with the Democrats leading the Congress, the 'Out of Iraq' caucus contained only a third of House Democrats, and while vocal, they were able to do little to prevent the Democratic leadership, along with the Republican rank-and-file from supporting and financing President Bush's new plan to intensify the war in Iraq.¹⁴

To summarize, the vast majority of past and current research on American constitutional war powers maintains that presidents have often acted unilaterally with regard to their perceived powers as commander in chief, and Congress has largely deferred to presidential leadership for major use-of-force decisions, including the decision of whether or not to use force abroad.¹⁵ Some recent scholarship, however, maintains that Congress is far more significant in exercising its war powers than previously maintained. By some accounts, Congress is highly partisan on foreign affairs and will wage partisan challenges on the commander in chief's asserted authority to use force abroad, which at times may result in significant limitations on the president.¹⁶ Nonetheless, it seems evident that one clear legacy of George W. Bush's presidency is that of a commander in chief who was able to make wide claims of military power and authority as Congress continued to support Bush's military endeavours, even at times when public opinion poll numbers were abysmally low for the president.¹⁷ It is this context that Barack Obama and Joe Biden inherited their positions at the White House, which appears ripe for a period of strong leadership as exercised by the commander in chief.

Joseph Biden and War Powers

Joe Biden was first elected to the United States Senate in 1972, where he remained until his service as vice president. It is first notable that Biden became vice president in an era when the office has gained new prominence in shaping both American domestic and international policy. Since the vice presidency of Walter Mondale through the vice presidency of Richard Cheney, this office has grown in saliency and responsibilities within the executive branch.¹⁸ Recent journalistic findings in this early phase of the Obama presidency suggest that Biden has some degree of independent influence within the administration, especially international affairs.¹⁹ In addition, one of Biden's major areas of interest while serving for over three decades in the United States Senate was American foreign policy. Upon his election as vice president, Biden held the chairmanship of the Senate Foreign Relations Committee. For all of these reasons, it seems legitimate and relevant to the current presidency to understand Vice President Biden's previously expressed views on war powers and the constitutional authority to use force abroad.

Senator Biden on Constitutional War Powers

Among American senators, Joe Biden was especially well versed on constitutional war powers, which was evident through an array of speeches provided on the Senate floor, his service on the Senate Foreign Relations Committee, his introduced

legislation aimed at limiting presidential military actions, and his published scholarship on this issue. Biden has a long record of advocating for congressional war powers and the notion that presidents may not use force without congressional approval. At the same time, however, Biden also has argued that there are exceptions when the commander in chief may use force without congressional authorization, and has supported some unilateral military actions by presidents, which results in a somewhat inconsistent record on this issue.

The most substantive legislative example of Biden's interest in war powers is evident through his proposed *Use of Force Act*. This proposal stems from his participation on the Special Committee on War Powers, which was established in 1987 by the Senate Foreign Relations Committee, and was partly in response to the Reagan administration's decision to place Kuwaiti oil tankers under the protection of an American flag in 1987 without congressional consultation. More generally at the time, some members of Congress had grown increasingly concerned about the expansion of power exercised by the commander in chief and the perceived failures and limitations of the War Powers Resolution.²⁰

In explaining much of the logic for his legislative proposal, Biden co-authored a law review article on the topic, which demonstrated a detailed and historically grounded understanding of war powers, including a discussion of James Madison's *Notes of Debates of the Federal Convention in 1787*, where Madison wrote that a commander in chief may only use force independently to 'repel sudden attacks'. Otherwise, as Biden wrote, congressional approval to use force was required.²¹ In addition, Biden's article made references to early American presidents, who stated clearly that force may not be used without legislative approval. Moreover, Biden discussed two key United States Supreme Court cases, *Bas v. Tingy* (1800) and *Talbot v. Seeman* (1801) that built upon the understanding that congressional approval was required for essentially the full gamut of American military engagements. Biden and his co-author also cited President James Buchanan's views on war powers: 'Without the authority of Congress the President cannot fire a hostile gun in any case except to repel the attacks of an enemy.'²²

In his discussion of this history of war powers, Biden also established an understanding of other perspectives on war powers, including the view that a president may use force without congressional approval. He and his co-author referred to these claims as the 'monarchist' perspective, which evolved and emboldened the commander in chief after the Second World War, as Congress retreated from exercising meaningful checks on the president in the face of communism. Biden's academic views square with the majority of scholars who have published on war powers, and in doing so, he and his co-author demonstrate a considerable familiarity with major scholarly works on war powers that is uncommon for an American senator.

In his proposed *Use of Force Act*, Biden called for a joint decision framework, such that the president is required to consult with Congress prior to and during the use of force abroad. Biden made the case that 'joint deliberation' fosters American national security interests. In this proposal, Biden addressed five military situations when the commander in chief would be permitted to use force without congressional consultation or approval. These situations include the ability to repel an armed attack,

the right to respond to a 'foreign military threat that threatens the supreme national interest under the United States under emergency conditions' that does not permit time for congressional consultation; the ability to rescue citizens abroad from emergency situations; the ability to 'forestall an imminent act of international terrorism' directed at the United States; and to protect the rights of 'innocent and free passage in the air and seas'.²³

Soon after the publication of his war powers law review article in 1988, Biden also suggested that the president may also use force as long as a UN Security Council resolution existed and Congress had been consulted.²⁴ Biden later included this exception in his 1992 Use of Force Act proposal,²⁵ but in the lead-up to the war resolution vote on the first Persian Gulf War in 1991, Biden argued that President Bush did not have authority to use force in Iraq, despite the Security Council's approval. He noted that 'The choice to go to war remains with the Congress, and the Congress alone, as it always does.'²⁶ The Security Council exception for the president, however, did not appear in his 1995 or 1998 proposals.²⁷

In many respects, the situations that Biden discussed permit the president to use force quite liberally and allow substantial room for the commander in chief to interpret when and how to use force. In this regard, this proposal could be fairly criticized for granting substantial war powers to the commander in chief, and thus further distancing the Congress from its constitutional duty to check the president. His interest in allowing the commander in chief to use force with Security Council authorization, but without congressional approval also contradicts the legislative history of American membership in the UN, which protected Congress's war powers.²⁸

At the same time, the root principle that Biden forwarded centred on the notion of shared presidential and congressional responsibility to determine when force may be used. When the president is permitted to act without congressional approval in Biden's proposal, most of these conditions involve 'emergency' situations. Without an emergency, congressional consultation is required, although Biden does not specifically require congressional approval. In order to foster such consultation and to require meaningful dialogue between the congress and commander in chief, Biden called for the creation of a 'Congressional Leadership Group' consisting of House and Senate leaders from both parties. This group would meet periodically to encourage sustained consultations between the commander in chief and key foreign policy and intelligence officials in the executive branch.²⁹

While Biden's proposal is unquestionably open to criticism from those who argue for greater congressional involvement in use of force decisions, it is clear that his proposal seeks to move away from what he views as the 'monarchist' practices of the commander in chief, and that enhanced congressional involvement in military decisions is both constitutional and useful in terms of political practice. In this respect, Biden seems to recognize the value and appropriateness of congressional involvement in what he would likely view as 'non-emergency' military situations, and that the president is not permitted to assert unilateral decision-making authority for warfare.

Apart from Biden's scholarly writings and his Use of Force Act proposals, over the course of his Senate career Biden took a number of positions on presidential military

actions that provide additional insight on his views on war powers. In a number of military actions, he called for prior congressional input and approval before a commander in chief may use force. Biden was an early supporter of Senator Jacob Javits' (Republican, New York State) efforts to revise the war powers arrangement and was a co-sponsor of Javits' efforts in 1973 to encourage the Senate to take up what eventually became the War Powers Resolution.³⁰ In the first term of Ronald Reagan's presidency, Biden was also quite clear in calling for the application of the War Powers Resolution to the American troop deployment to Lebanon. In doing so, Biden clearly expressed his support for a congressional role in determining whether or not troops should remain deployed abroad in this peacekeeping mission.³¹ In referencing the specific language of the War Powers Resolution, well before the suicide truck bombing that took 241 American lives, Biden noted:

when the marines were sent as part of the multinational force, I believe they were entering into an area of hostilities. Some disagreed with that assertion of mine back then in the Foreign Relations Committee, but I think they are hostilities. And I think the War Powers Act should have been triggered immediately and have so stated in the past.³²

Biden made a nearly identical argument in 1984 when debate arose in Congress over President Reagan's deployment of American troops to El Salvador. Biden was again clear in this case, noting that 'The President does not have the authority to make war, he has the authority to conduct a war. A Commander in Chief does not initiate a war, he conducts a war.' In the same speech, in calling for congressional oversight of the commander in chief, Biden pleaded with the president to 'Let us be part of what is our constitutional obligation'.³³

On Reagan's troop deployment to Grenada in 1983, which occurred without congressional consultation and has largely been viewed as a unilateral American troop deployment by the commander in chief, Biden supported the president's actions in this case, noting that based on the intelligence briefing he had received, the president was justified to act.³⁴ Thus, across these three cases in the Reagan administration, Biden's record on war powers is mixed. At times, he quite forcefully advocated Congress's war powers authority when other members of Congress said little, but on Reagan's military operation in Grenada he supported the unilateral action conducted by the commander in chief.³⁵ Biden also sought to invoke the War Powers Resolution, whose critics note may empower the commander in chief, but also referenced the War Powers Resolution in an effort to rein in American military deployments.

In other presidential administrations, Biden has a similar record in calling for congressional checks on the commander in chief, which is evident during the presidency of George H.W. Bush. Biden argued against empowering Bush militarily prior to the use of force in Panama in 1989.³⁶ In addition, Biden was clear in calling for meaningful legislative actions to limit Bush prior to Operation Desert Storm. In the lead-up to the 1991 war in Iraq, while expressing his position and views on the limitations on the commander in chief, Biden referenced founding fathers James Madison, Elbridge Gerry, and Alexander Hamilton, who in Biden's historical recollection were quite specific: 'The real issue was authorization of war, which the framers did not

intend to give to the President.³⁷ Biden openly challenged President Bush's perspective that the commander in chief was constitutionally permitted to use force against Saddam Hussein without congressional approval.³⁸

When the Senate conducted its final debates over whether or not to support President Bush's desire to use force in Iraq in 1991, Biden spoke at length regarding his opposition to the view that a president could independently initiate military action. Quite poignantly, Biden stated:

On this point the Constitution is as clear as it is plain. While article II of the Constitution gives the President the power to command our troops, article I of the Constitution commits to Congress and Congress alone the power to decide if this Nation will go to war. The Framers of our Constitution took great pains to ensure that the Government they established for us would differ from the rule of the British monarchs. They knew firsthand of the consequences of leaving the choice between war and peace to one man.³⁹

When the civil conflict in Bosnia erupted in 1992, Biden was quick to voice his support for military action to prevent additional atrocities in the Balkans, but also called upon Congress to exercise its constitutional powers to authorize American military action prior to American military engagement. While nearing a congressional adjournment for the 1992 fall elections, and while simultaneously encouraging the UN Security Council to authorize the creation of no-fly zones in Bosnia that would also permit military enforcement of such zones, Biden introduced a resolution that called upon the Senate to support military action if necessary. He noted, 'I believe Congress should as a matter of policy and as a matter of constitutional principle act to provide such authority before adjournment.'⁴⁰ In this case, Biden demonstrated his willingness to use force as well as his respect for Congress's role in military decisions for the United States.

During the Clinton administration, Biden is remembered for being a strong advocate of American and NATO military intervention in the Balkans, and for his support of military strikes against Yugoslavian President Slobodan Milosevic.⁴¹ At the same time, Biden argued that President Clinton 'and the Presidents under whom I have served have all misread the Constitution', through assertions as commander in chief that were not intended by the constitutional framers. In the Clinton administration, Biden advocated greater limitations on presidential war powers in the aftermath of the crisis in Somalia in 1993, in the lead-up to the American troop deployment to Haiti in 1994, and through his references to his Use of Force Act.⁴² In the hours prior to NATO's air strikes on Milosevic in 1999, Biden led the floor debate in calling for the Senate's authorization approval for Clinton's requested action, noting after the vote's conclusion that 'I do not think the President has the authority to use force in this nature without our approval'.⁴³ While it is clear that Biden favoured military action and took hawkish views during the Clinton presidency regarding the Balkan crises, he also demonstrated a non-partisan interest in protecting and asserting Congress's war powers. Yet Biden did not actively oppose presidential military actions that were not authorized by Congress, and certainly in Bosnia in 1995 and Kosovo in 1999, quite actively backed the president when force was used.⁴⁴

In the presidency of George W. Bush, Biden's record is again mixed. In the limited discussion that took place prior to Congress's vote to authorize President Bush's 'global war on terrorism' after the 11 September strikes, Biden acknowledged that Congress had provided wide latitude in permitting the president to wage a military response to those involved in the terrorist strikes on the United States. Yet he also noted that Congress had actually checked the president by not extending him powers to 'deter and preempt any future acts of terrorism against the United States', which the White House had originally requested in its discussions with the members of Congress. While Congress did grant President Bush extremely wide authority to use force, which Biden supported, Biden still referenced the constitutional limitations on the president and his opposition to 'extend these authorities', e.g. those proposed by the White House, which is notable given how few others even raised the issue of Congress's constitutional checking role during this crisis.⁴⁵

On the resolution to grant President Bush authority to use force in 2002 against Iraq, Biden's focus was primarily on stating that he did not support a doctrine of military preemption. His record on this vote provides contradictory evidence regarding his previous views on war powers. Biden voted for one of Senator Robert Byrd's (Democrat, West Virginia) amendments which called for more deliberation and opposition to Bush's foreign policy direction to Iraq. One of Byrd's amendments placed a limitation on the authorization to use force to one year, which failed in the Senate. In making his arguments for supporting the amendment, Biden noted that during war, Congress's power of the purse is difficult to invoke against the president, and thus Byrd's proposal was useful in limiting the president's military powers. Biden was one of only 31 senators who voted for this resolution.⁴⁶ In this respect, Biden voted to permit a congressional checking role, and more generally, Biden was part of the deliberative political process that determined the merits of President Bush's movement toward war.

Biden, however, did not support Senator Carl Levin's (Democrat, Michigan) amendment to require the president to return to the Congress after President Bush sought UN Security Council approval for military action. Biden argued that it was sufficient to grant the commander in chief discretion at that time to use force if necessary, whether or not Security Council authorization was gained.⁴⁷ Moreover, in the key and final vote on the authorization to use force, Biden voted with 76 other senators to grant the president wide authority to determine if military force against Saddam Hussein was merited or not.⁴⁸ Biden's support for this resolution contrasts with his past statements on Congress's war powers authority, given his long-standing rhetoric in favour of Congress's role in determining if military action was an appropriate policy step, rather than granting presidential discretion in determining if force should be used.

In sum, Biden's Senate record on war powers is mixed. While it is clear that in many instances Biden advocated for Congress's war powers, the constitutional framers' belief in checks and balances on the commander in chief, and 'joint deliberation' between the president and Congress prior to the use of force, he also supported commanders in chief who used force without congressional authorization. His support for Reagan's actions in Grenada, his backing of the Clinton

administration's strikes in Bosnia and Kosovo, and his previous interest in supporting a commander in chief who had gained Security Council approval without congressional approval results in an inconsistent record. His proposed 'Use of Force Act' also invites the same kinds of problems faced by the War Powers Resolution, where presidents may use semantic distinctions to avoid congressional oversight and limitations on the commander in chief.⁴⁹ Unlike many members of the modern Congress, however, what is clear is that Biden has demonstrated a well-grounded historical knowledge of war powers, and on a number of occasions has sought legislative remedies aimed at ending the practice of a 'monarchist' presidency who alone determines if and when force will be used abroad.

Barack Obama and War Powers

In contrast to Vice President Joe Biden's history on war powers, President Obama's record on this subject is much less extensive. It is, however, clear that Obama does not hold what Biden would call a 'monarchist' view regarding the authority of the commander in chief. Obama believes that Congress is constitutionally permitted and justified to challenge the president during war. In this section, the analysis will focus on Obama's views on war powers as a senator, as president-elect, and on his first actions and practices as commander in chief.

Senator and President-elect Obama

After his successful 2004 campaign bid to become the junior senator from Illinois, Obama did not speak often about the appropriate constitutional balance of powers between the Congress and the commander in chief, or in a substantive manner about his preferred strategy for Iraq.⁵⁰ Obama's views on President Bush's policies toward Iraq, however, developed in late 2006 and more so in 2007 when Bush proposed and eventually implemented his troop surge strategy.

The first major signs of Obama's willingness to challenge the commander in chief came in November 2006, when from the campaign trail, Obama called for a new strategic direction for Iraq. On war authority related to appropriations powers during the war, Obama maintained:

Congress has given the Administration unprecedented flexibility in determining how to spend more than 20 billion dollars in Iraq . . . This must end in the next session of Congress, when we assert our authority to oversee the management of this war.⁵¹

In this case, Obama's views indicate a belief that Congress can influence *how* a war is waged, which certainly goes beyond the notion that Congress can only check the president prior to the initiation of warfare. Obama indicates here a willingness to check the president on the actual *conduct* of a war.

With new democratic majorities in the House and Senate in 2007 after the midterm elections, Obama continued to elaborate on his views regarding Congress's ability to manage the war in Iraq, and in particular, what he viewed as Congress's legitimate role to prevent additional troops from being deployed without

congressional approval. As Bush's troop surge plan became evident, Obama noted, 'It now falls on Congress to find a way to support our troops in the field while still preventing the President from multiplying his previous mistakes.'⁵² Obama expanded upon these remarks on the Senate floor, noting 'I said publicly that it is my preference not to micromanage the Commander-in-Chief in the prosecution of war. Ultimately, I do not believe that it is the ideal role for Congress to play. But at a certain point, we have to draw a line.'⁵³

Obama was later equally explicit about Congress's role in shaping American war decisions when he proposed major troop reductions to Iraq, and expressed his opposition to Bush's troop surge proposals. For example, in arguing that President Bush had failed in Iraq, Senator Obama argued, 'That is why Congress now has the duty to prevent even more mistakes.' In this same address, he added that under his proposal, Bush would not be permitted to deploy additional troops to Iraq 'without explicit authorization by the Congress'.⁵⁴ Both comments clearly suggest meaningful ways in which Congress can influence war and provide a check on the commander in chief, both on *how* a war was wage and *whether* more troops could be introduced into warfare. When he was queried on the constitutionality of his proposals, Obama added that Congress's 2002 authorization to use force in Iraq did not permit President Bush total and absolute discretion in determining war policies. He remarked, 'The notion that as a consequence of that authorization, the president can continue down a failed path without any constraints from Congress whatsoever is wrong and is not warranted by our Constitution.'⁵⁵

It is notable that Hillary Clinton's war powers record in the US Senate is not dramatically different from Senator Obama's. In the Senate, Clinton's most aggressive assertions of congressional war powers came during her presidential campaign. As an incoming member of the Senate Armed Services Committee in 2007, Clinton noted that she would provide 'stronger oversight in order to change our failed policy in Iraq'.⁵⁶ Moreover, on the Bush administration's concerns over Iran, she stated: 'If the administration believes that any use of force against Iran is necessary, the President must come to Congress to seek that authority.'⁵⁷ Thus, like Obama, Hillary Clinton was equally explicit and clear regarding Congress's war powers, oversight, and decision-making authority for the use of force.

As president-elect, Obama took one step that may suggest some interest in constitutional war powers. On 12 December 2008, Obama met with former Secretaries of State James A. Baker and Warren Christopher, the two leading voices of the 2008 National Commission on War Powers, to ostensibly discuss their proposal. At the meeting's conclusion, Obama made no public statement, although Obama spokesman, Denis McDonough, who now serves at the Director for Strategic Communications for the National Security Council noted:

President-elect Obama expressed his appreciation for their work and said he would review the commission's proposal. The president-elect underscored his commitment to working closely with Congress with bipartisan participation.⁵⁸

Although Obama and McDonough were clearly non-committal, the decision to grant a meeting with Christopher and Warren suggested some willingness to at least discuss

the proposal, which at its core is intended to make the decision to use force abroad shared more equally between Congress and the commander in chief.⁵⁹

President Obama

As commander in chief, there are at least two instances of military action that provide some insight on the Obama administration's perception of presidential war powers. These initial snapshots of Obama's brief tenure as commander in chief include his new policies toward Afghanistan, and his decision to allow the US Navy to use force against Somali pirates. In both cases, the Obama administration's actions suggest the beginnings of a presidency that will follow along similar lines of conduct as previous commanders in chief, in which presidents have asserted broad powers when using force abroad, and to some extent contrast with Obama's, Biden's, and Secretary of State Hillary Clinton's previously stated views on war powers.

Afghanistan

It was clear from early in his administration that Obama would approach Afghanistan differently from his predecessor. Within weeks of his inauguration, on 17 February, Obama announced his plans to send a Marine expeditionary brigade and an Army Stryker Brigade to Afghanistan at the request of Secretary of Defense Robert Gates and General David McKiernan, the commanding officer then in Afghanistan.⁶⁰ This policy was reached without any measurable public debate in Congress.

Approximately one month later, Obama announced his plans to significantly revise the American war strategy in Afghanistan, which included his plans to deploy 17,000 additional American combat forces and 4,000 military advisors to Afghanistan. In announcing his plans, Obama noted the existing bipartisan support for his current efforts. In doing so, Obama called upon the Congress to approve of a bill sponsored by Senators John Kerry (Democrat, Massachusetts) and Richard Lugar (Republican, Indiana) to authorize a \$1.5 billion spending increase every year for five consecutive years to Pakistan. He also noted his support for a bill proposed by Senator Maria Cantwell (Democrat, Washington state) and Representatives Chris Van Hollen (Democrat, Maryland) and Peter Hoekstra (Republican, Michigan) to provide additional economic assistance to Afghanistan.⁶¹ The extent to which these members influenced President Obama and his senior advisors, if at all, is not clear, but at minimum indicates that some members of Congress were in synch with the administration's efforts from the start.

In the aftermath of this proposal, Obama received what he sought from Congress with little opposition. The House approved of Obama's request in a 368-60 vote, with 51 Democrats voting against the proposal. The Senate unanimously approved of the Kerry-Lugar proposal.⁶² While there is a small minority of House Democrats who raised concerns over Obama's plans, even the most vocal antiwar critics of the Bush administration have found it difficult to generate similar levels of criticism for President Obama. The Out of Iraq Caucus, the most assertive group of critics of George W. Bush's war policies, has not transferred its criticism to Obama and

his new war strategy in Afghanistan, and by some accounts, has been 'largely silent' on Obama's Afghan troop increase.⁶³

Obama did not inform or notify members of Congress of his administration's new military approach to Afghanistan through a specific letter to congressional leaders, though in a letter to congressional leaders in June 2009 regarding all American combat-deployed troops, Obama justified his administration's actions in Afghanistan and all other combat operations through his powers 'pursuant to my constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive', which is the same language used by Obama's most recent predecessors regarding American military conduct abroad.⁶⁴ Given that the authorization to use force in Afghanistan on 15 September 2001 was so broad, a strong case can be made that Obama is acting within his constitutional authority as commander in chief in his troop decision, and in that respect, large-scale congressional involvement may not necessarily be expected.

At the same time, in 2009 many analysts concluded that the mission in Afghanistan was failing.⁶⁵ In using the previous standard that Obama and Hillary Clinton applied to President Bush in 2007, congressional authorization for this troop surge is a possible response that the administration may have sought from Congress. Much like President Bush, however, the Obama administration did not call for a congressional vote for this combat troop escalation. The ground conditions in Iraq and Afghanistan are clearly different, and the specific authorizations for the uses of force in Afghanistan and Iraq are also different – with Afghanistan being much broader in scope – but in both cases thousands of troops were added to combat missions that were widely viewed as failures, and thus contains some of the parameters for when Obama previously called for congressional authorization before the commander in chief could proceed. Nonetheless, while some debate over certain aspects of Obama's new foreign policy direction in Afghanistan exists in Congress, the President's decision to place 21,000 more American forces in Afghanistan received little legislative criticism, and in essence, was a *fait accompli* by mid-summer 2009.⁶⁶

Obama's second troop surge decision entailed the deployment of 30,000 additional troops as well as 7,000 additional forces from the NATO allies. By mid-spring 2010, nearly 90,000 troops from 45 states were contributing to NATO's International Security Assistance Force (ISAF) in Afghanistan, of which approximately 39,000 were non-American.⁶⁷ Obama announced the new policy after nine 'war council' meetings and extensive public lobbying by General McKiernan's successor, General Stanley McChrystal. Again, the new policy was made with limited congressional involvement, or anywhere near what Joe Biden would portray in the past as 'joint deliberation' between the branches. While it is clear that Senator John Kerry played an important diplomatic role for the Obama administration after the flawed Afghan national elections, and encouraged a re-evaluation of American military policy in the region, journalistic accounts of key decision moments during the entire war council evaluation period indicate that 'The White House spent little time courting Congress' and that 'no overtures were made to party leaders'. It does appear that White House Chief of Staff Rahm Emanuel was in close contact with

Senator Lindsey Graham (Republican, South Carolina), but otherwise members of Congress were not included in Obama's key war council debates over how to handle Afghanistan.⁶⁸

Along with President Obama's two troop surges, it is notable how little congressional discussion has occurred over Obama's use of Unmanned Aerial Vehicle (UAV) bombings in Afghanistan and Pakistan, which have increased substantially during his presidency.⁶⁹ Members of Congress have publicly raised few qualms with these strikes. Other than the effort led by Congressman Dennis Kucinich (Democrat, Ohio) in March 2010 that called for the withdrawal of American troops from Afghanistan and gathered votes from only 50 House democrats and five republicans, most members of Congress have rallied behind Obama's heightened war efforts.⁷⁰ Again, Obama's central congressional critics are a small number of House Democrats; Republicans have otherwise provided nearly universal support for the war strategy.

In sum, many members of Congress have expressed their views on Obama's military efforts in Afghanistan, and some, notably Senators Kerry and Graham, may have exercised some influence on the war strategy. Yet it is also clear that Obama's leadership on this war suggests that his administration, much like his previous commanders in chief, will assert strong military powers, which to some extent contrasts with Obama's, Biden's, and Hillary Clinton's views while in the US Senate. Moreover, Congress, in a generally bipartisan fashion, has supported the Obama administration's new war aims and strategy for Afghanistan with little controversy.

Somali Piracy

Regarding the actions of the US Navy Seals that resulted in the killing of three Somali pirates, there is little evidence to suggest that Congress had any role in the actual decision to use force. Secretary of Defense Robert Gates noted that after the pirates captured Captain Richard Phillips on 8 April 2009 the Pentagon made two requests to use force. Two requests were made because of the different nature of the special operations forces that had been sent to the region, each of which required its own set of authority to act. Gates noted that in both cases, the White House gave approval for the action 'virtually immediately', which suggests a high probability that the decision-making occurred exclusively at the White House.⁷¹

In describing the actual use force, which included three separate bullet shots against three separate pirates, Vice Admiral William Gortney noted that the authority given to use force indicated 'that at any time the on-scene commander felt that Captain Phillips' life was in danger that they could take action' and that 'our authorities came directly from the president'.⁷² After force had been used and Phillips successfully returned to the *USS Boxer*, Obama released a press statement that applauded Captain Phillips' bravery and the actions of the American military. In his statement, Obama did not make reference to his constitutional powers as commander in chief. Nor did he inform Congress of this military action in writing.⁷³ Implicitly, it is clear that Obama saw this action within his constitutional authority, and given that no letter was provided to Congress to explain the military action, it

seems that the administration viewed the action as so self-evidently a presidential power that a formal explanation was unnecessary.

Certainly, a strong case can be made that an American's life was in danger, and that the emergency situation required immediate defensive action. In addition, military actions against pirates, within the context of international law, have generally been viewed as defensive, especially when the use of force has been limited and proportional.⁷⁴ Moreover, the United Nations Security Council had specifically authorized 'all necessary measures' to permit military actions against Somalia pirates in both June 2008 and December 2008, which provides additional international legal justification for this action.⁷⁵

At the same time, the Constitution gives Congress the power to 'To define and punish Piracies and Felonies committed on the high Seas'.⁷⁶ This power has rarely been considered since the first decades of the American republic, but clearly empowers Congress to act if such a threat would arise. Perhaps the most well-known case of pirating and the American response is President Thomas Jefferson's actions against pirates from Tripoli in 1801. While some debate exists over the constitutionality of Jefferson's actions, which resulted in strikes against pirates and the sinking of a pirate ship, it has been argued that the Jefferson administration acted with congressional approval.⁷⁷ Other analysts of Jefferson's actions maintain that he had actually approved of offensive military actions against the pirates to be used at the naval commander's discretion, and that Jefferson had not been completely truthful with the US Congress regarding his instructions to the Navy, which went beyond simple defensive measures to protect American shipping in the Mediterranean.⁷⁸

Regardless of the different interpretations and emphases historians have placed on Jefferson's actions, a case can be made that Congress had provided Jefferson some degree of prior authority to act to protect American commerce in the region. It is also indisputable that Jefferson returned to Congress after the initial military actions and sought additional legislative approval for military actions against the pirates. Regarding the next possible military step, Jefferson noted, 'in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgement may form itself on a knowledge and consideration of every circumstance of weight'.⁷⁹

President James Monroe similarly noted restrictions on his power as commander in chief against pirates, and requested congressional guidance on the extent of how aggressively the United States should pursue pirates in 1824. Monroe stated to Congress, 'Whether those robbers should be pursued on the land, the local authorities be made responsible for these atrocities, or any other measure be resorted to suppress them, is submitted to the consideration of Congress'.⁸⁰

Certainly, it is difficult to draw close parallels to Jefferson's and Monroe's battles with pirates and Obama's actions. Yet, Congress had not specifically approved of the broader American presence in the region to engage in anti-pirating police actions. Nonetheless, the United States already had American battleships in Somali coastal waters as part of a NATO anti-piracy mission. The alliance had conducted these operations in the last three months of the Bush administration. In March 2009, this mission recommenced once Obama was in office and well before the hostage crisis

with Captain Phillips. NATO had already approved of Operation Allied Protector, which consisted of five naval war ships, including the USS *Halyburton*.⁸¹ The USS *Bainbridge* was also in these waters at the time of the attack. In this regard, the Obama administration had already defined the American response to the pirates, independent of congressional input. There is also little evidence to indicate that Obama consulted with members of Congress prior to the use of force. And unlike President Jefferson, Obama has at the time of writing not yet returned to Congress to report on his military actions and has not sought further guidance on how and if to act militarily against the pirates, as Jefferson and Madison did.

Moreover, it seems clear that the world's major powers wanted specific international legal authority to act against the pirates, which suggests that the existing laws of military action against piracy are not clear, and that specific UN Security Council action was then believed to be necessary. Yet, a Security Council Resolution alone does not authorize the president to take military measures independent of congressional authorization.⁸²

Soon after the strikes, the House of Representatives applauded the conduct of the American navy and of Captain Phillips; members of Congress refrained from any constitutional critique of Obama for his actions.⁸³ While this use of force does not perfectly represent a case of presidential imperialism, it is certainly clear that presidential leadership and congressional deference again generally explain this action, which does not perfectly comport with the constitution, given Congress's explicit powers on piracy and the larger American naval presence in this region of the Indian Ocean in the absence of congressional approval. In addition, little evidence exists for Joe Biden's previously preferred 'joint decision' framework for the making of the broader American policy for dealing with Somali pirates.

Conclusion

As senators, Joe Biden, Barack Obama, and Hillary Clinton had records of advocating Congress's war powers. Among American senators over the last three decades, Joe Biden is unique in his frequent calls for war powers reforms, his historical knowledge of war powers, and for his non-partisan calls for enhanced checks on 'monarchical' commanders in chief. At the same time, he has also supported unilateral actions by the commander in chief. Obama's and Hillary Clinton's record on this issue are more limited given their much shorter tenures in the Senate, but nonetheless still indicate a history of favouring congressional actions that can restrict a commander in chief. These constitutional views stand in strong contrast to presidents since the Second World War, who have generally invoked unilateral claims as commander in chief. In many respects, Biden's, Clinton's, and Obama's views in the Senate are different from previous commanders in chief, and indicate a more balanced constitutional perspective that permits checks and balances when force may be used abroad.

Now in the White House, however, some early signs suggest that this administration is conducting itself similarly to previous commanders in chief, which makes its military decisions with limited substantive consultation or input from Congress. Congress also appears to be settling into deferential behaviour, following the lead of

the Obama administration through its support of Obama's military actions. This research comports with much of the previous scholarship on war powers, which indicates that the commander in chief dominates the American military policy-making process, as the vast majority of Congress defers to presidential leadership. The findings presented here also suggest a lack of congressional partisanship on war powers, which contrasts with some current scholarship on Congress's role in foreign policy and war powers specifically. Obama's decision and then eventual use of force against the Somali pirates generated no congressional backlash from either political party. On Afghanistan, nearly all members of Congress supported Obama's first troop surge, and his second troop surge decision generated only minimal opposition from liberal congressional Democrats – not Republicans. Congress played very little role in either troop surge decision, and from an institutional perspective overwhelmingly backed the president regardless of political party affiliation.

Certainly, the legacy of the George W. Bush administration provides the political context for such behaviour, as well as the longer history of presidential empowerment established in the Cold War era. In addition, it appears that Obama's, Biden's, and Hillary Clinton's previous views on congressional war powers are not, at least from these first military decisions, the guiding constitutional principles that shape their relationship with the Congress. Much like Presidents Reagan, Bush, George H.W. Bush, and Clinton, the pattern of an assertive commander in chief appears to come with the conduct of the executive branch. At the same time, Congress has become more and more focused on in-district constituency service and electoral campaign activities. As an institution, the legislative branch spends less and less time in Washington carrying out legislative and oversight activities, resulting in an abdication of its constitutional duties to check the commander in chief.⁸⁴ Rather than serving as a partner in military decisions for the United States, Congress finds much greater political incentives in placing the responsibility for national security actions with the commander in chief, which creates an imbalance that favours an empowered president.

While the United States has not entered a 'new' war, which would provide a clearer test of how the Obama administration views its constitutional authority to use force, the administration's actions in Afghanistan and in the Indian Ocean suggest that the existing pattern of congressional deference and executive military leadership remains the norm. In this regard, Congress will likely continue to grant the commander in chief considerable leeway in determining how and when force is used abroad, and thus is unlikely to change the direction of American military policy. In an era of pirate-fighting, counter-insurgency operations, and American military strikes from unmanned aerial vehicles, all of which present complex security and strategic questions for the United States, the commander in chief – and not the Congress – will determine how the United States military is used abroad.

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